

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

May 1, 2007

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In the Matter of

Travis Snell

DALA Docket No. DEP-06-80  
DEP Docket No. 2005-226  
DEP File No. 137-814  
Concord

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Final Decision

I adopt the Recommended Final Decision of the Administrative Magistrate that a final wetlands permit should be issued for this project based upon the evidence and provide an additional statement of reasons to be applied in future cases. This appeal is illustrative of cases involving the question of whether work in the buffer zone will protect the interests of the Wetlands Protection Act. Here, abutters raised concerns about the potential for increased flooding from the construction of a single family house. The work, however, was limited to approximately 7% of the buffer zone, located more than fifty feet from the resource area, and conditioned to require infiltration of runoff. The notice of intent for this project was filed in September of 2004, so the prior version of the wetlands regulations apply to this project. Projects proposing work in the buffer zone for which the notice of intent was filed after March 1, 2005 will be subject to revised standards under the wetlands regulations, which will affect the resolution of appeals.

In this case and many others, the issue identified for adjudication was whether work proposed in the buffer zone of bordering vegetated wetland would destroy or otherwise impair the ability of the wetland to perform its flood control or storm damage functions, citing to 310 CMR 10.55(4)(a).<sup>1</sup> The difficulty of linking work in the buffer zone directly to interests of the Act, without the benefit of performance standards that apply for work in resource areas, was an important rationale for the 2005 regulatory revisions to the wetlands regulations. For appeals of more recent cases, the issue for adjudication should be whether the work in the buffer zone complies with the new provisions of 310 CMR 10.53(1), the narrative standard for work in the buffer zone. The focus should remain squarely on the extent of the work, its proximity to the resource area, and any characteristics of the buffer zone at the site, to avoid adverse effects on the resource area.<sup>2</sup>

Secondly, the new provisions for simplified review may serve as a tool to resolve appeals, even if an applicant has not initially used this certification process. In instituting the simplified review procedure, the Department essentially determined that certain limited work in the buffer zone meets, as a matter of law, the existing jurisdiction and standards in the wetlands Act and regulations. See Preface to the Wetlands Protection Act Regulations, 2005 Revisions. The criteria apply to inland resource areas and require no work within the first 50 feet from the resource area, no impervious surface greater than 40% of the area between 50 and 100 feet from the resource area, erosion and

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<sup>1</sup> In fact, the issue was overstated. Work in the buffer zone must contribute to the protection of the interests of the Act as required by 310 CMR 10.03(3), but need not necessarily meet the standard of “not destroy or otherwise impair” imposed under 310 CMR 10.55(4) for work in the resource area itself.

<sup>2</sup> The past practice of focusing on interests of the Act, such as flood control, in appeals of work in the buffer zone tended to omit the controlling question of whether *the resource area* would be adversely affected, impairing its ability to support that interest.

sedimentation controls, stormwater management if applicable, and a buffer zone that does not contain slopes greater than 15%, estimated rare species habitat, or border an Outstanding Resource Water. 310 CMR 10.02(2)(b)2. c., d., e., f., g., h., and i.<sup>3</sup>

For example, this applicant filed a notice of intent for a project which appears to meet the simplified review eligibility criteria at 310 CMR 10.02(2)(b)2.<sup>4</sup> Under the revised wetlands regulations, the issue would be whether the project complied with the narrative criteria for work in the buffer zone at 310 CMR 10.53(1). If the project does comply with the more stringent and precise criteria at 310 CMR 10.02(2)(b)2., any appeal would be susceptible to routine dismissal or summary judgment. A party contesting such a project should be prepared to demonstrate that one or more criteria has not been met and that the narrative standard at 310 CMR 10.53(1) should instead apply. Based upon the limited record before me, it appears this case might have been resolved without a hearing, during the prescreening process.<sup>5</sup>

I also note that this case largely involved “stormwater management,” or perhaps more appropriately “runoff” in the context of this single family house project. The Department’s Stormwater Management Standards do not apply to single family house projects because the quantity and quality of runoff is unlikely to cause adverse impacts on wetland areas provided that the order of conditions includes appropriate erosion and sedimentation controls during construction and there are no direct discharges. See

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<sup>3</sup> The procedural requirements for certification, confirmation of the boundary, and refilling within three years are subsumed by the filing of a notice of intent for the work and the issuance of an order of conditions. 310 CMR 10.02(2)(b)2. a., b., and j.

<sup>4</sup> This applicant filed prior to the regulatory revision establishing the simplified review process, so it was not available at that time. Even after this process became available in 2005, there are a variety of reasons why applicants with eligible projects may chose to file a notice of intent instead, and in some cases, the project plans may change in the course of review and the project may become eligible.

<sup>5</sup> If the regional office were to identify cases where the work met the criteria of 310 CMR 10.02(2)(b)2. in its cover letter with the superseding order, the status of the work would be flagged at an even earlier stage.

Stormwater Management, Vol. One, Stormwater Policy Handbook, March 1997, p. 1-14.

The regulations have been revised to require compliance with the stormwater standards, but if met, or not applicable, the regulatory requirements for wetlands protection from stormwater impacts are presumed to have been satisfied. See 310 CMR 10.05(6)(b); Stormwater Management, Vol. One, Stormwater Policy Handbook, March 1997, p.1-4. Additional evaluation of stormwater impacts under the narrative criteria for work in the buffer zone or the performance standards for work in resource areas is generally not warranted, except in unusual circumstances. In this case, there was no basis for requiring the applicant to provide an independent hydrologic analysis or for a conclusion that either the conservation commission or the Department lacked sufficient information without it.

Further, the regulatory provisions governing insufficient information at 310 CMR 10.05(6)(c) and 10.05(7)(h) are expressly limited to denials by the conservation commission, a circumstance not present here. The Department has other authority to deny work where it lacks information necessary to issue an appropriate permit. See, e.g., 310 CMR 4.04(2)(b)2; 310 CMR 10.05(7)(g). It is not relevant whether the Concord Natural Resources Commission should have denied this project for lack of sufficient information.<sup>6</sup> The Department would not require an independent hydrologic study; the Department has the expertise to conduct its own independent analysis of submitted information and the authority to request additional information where necessary. Nothing in the regulations or notice of intent materials even remotely suggests that a hydrologic

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<sup>6</sup> Quite to the contrary, the Concord Natural Resources Commission appears to have made a Herculean effort to evaluate the project and address the concerns of the neighborhood over the course of almost a year between the filing of the notice and the issuance of the order. The project was revised to establish the 50 foot setback, remove the basement, relocate the building envelop, reduce the driveway area, improve the stormwater infiltration design, and reduce the size of the septic system. In fact, this case is an example of an “affirmation” by the Department of a local order of condition that may exceed what the Department would have required.

analysis is necessary to evaluate a small project such as this in the buffer zone. Compare 310 CMR 10.57, Land Subject to Flooding.

Finally, parties seeking to challenge a wetlands permit must be prepared to provide expert testimony to meet the burden of going forward, credible evidence from a competent source. 310 CMR 10.03(2). Here the Petitioner provided testimony about flooding but lacked the requisite expert testimony that the work in the buffer zone would impact the bordering vegetated wetland resource area. A witness competent to provide testimony in wetlands science was necessary to support its case and none of Petitioner's witnesses were qualified in wetlands science. See Matter of Walden Woods, Docket No. 04-363 and 04-364, Final Decision, December 8, 2006. While there was lay evidence of flooding problems in the area, there was no expert opinion evidence that the cutting of trees in the outer portion of the buffer zone would have any adverse impact on the wetland.<sup>7</sup>

The parties to this proceeding are notified of their right to file a motion for reconsideration of this Decision, pursuant to 310 CMR 1.01 (14)(d). The motion must be filed with the Docket Clerk and served on all parties within seven business days of the postmark date of this Decision. A person who has the right to seek judicial review may appeal this Decision to the Superior Court pursuant to M.G.L. c. 30A, §14(1). The

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<sup>7</sup> I do not disregard the concerns of area residents about flooding or the cumulative effects of development on hydrology, but note that a high water table may be attributable to upland activities. In addition, the Concord Natural Resources Commission was correct that the wetlands regulations are not designed to provide a remedy for neighborhood flooding issues. See Matter of The Villages at Goddard Highlands Realty Trust, Docket No. 2003-116, Final Decision, July 25, 2006.

complaint must be filed in the Court within thirty days of receipt of this Decision.

This final document copy is being provided to you electronically by the Department of Environmental Protection. A signed copy of this document is on file at the DEP office listed on the letterhead.

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Arleen O'Donnell  
Acting Commissioner